

**STATEMENT OF
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES
FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE
JUDICIARY DIVISION OF THE FEDERAL BAR ASSOCIATION
FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES**

**BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON FEDERAL WORKFORCE
AND AGENCY ORGANIZATION**

MAY 16, 2006

These comments are submitted on behalf of the Association of Administrative Law Judges, the Federal Administrative Law Judges Conference, the Judiciary Division of the Federal Bar Association, and the FORUM of United States Administrative Law Judges. They address the subjects of judicial independence and the need for improved communication between the ALJ stakeholders and the Office of Personnel Management (OPM).¹

**Maintaining Decisional Independence of the Administrative Law Judiciary and
Adjudicative Fairness and Impartiality**

The administrative law judiciary was clothed by the Administrative Procedure Act of 1946, 5 U.S.C. § 551, et. seq. (APA), with decisional independence and unique statutory protections to ensure fair and impartial adjudication across the spectrum of national interest. That decisional independence cannot and should not be abrogated in the name of pay for performance. Testimony presented today explains why ALJ compensation needs to be enhanced and made competitive to attract well qualified senior professionals and to retain experienced ALJs. It also is imperative that OPM re-establish

¹ Under the provisions of the Administrative Procedure Act of 1946, 5 U.S.C. § 551, et seq., OPM was given the authority to administer the appointment of ALJs by other agencies and was designated, implicitly, as the guardian of the ALJ program. *See* 5 U.S.C. § 1305 which provides, in pertinent part, that OPM, for the purposes of 5 U.S.C. §§ 3105 (governing appointment of ALJs), 3344 (the loaning of ALJs between agencies), and 5372 (ALJ pay) “may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees as established for the courts of the United States.”

an office which exclusively addresses ALJ stakeholder issues and consults with the ALJ stakeholder community.

The adjudicative function performed by ALJs and the delicately balanced relationship that ALJs must maintain with their employing agencies distinguish ALJs from the remainder of the agency's workforce. Their adjudicative independence, established in the APA, enables ALJs to make fair and impartial decisions without fear of undue agency pressure or agency reprisal.

The seminal requirement of the APA is that hearings be conducted by merit-appointed ALJs. 5 U.S.C. § 3105. ALJs are appointed from a register maintained by OPM. Under current OPM regulations, to get on the register, an ALJ candidate is required to demonstrate competence and judicial temperament by establishing a minimum of 7 years of administrative law or other qualifying experience and obtain a satisfactory score on an all-day written examination. Further, an ALJ candidate is evaluated by a panel comprised of an OPM representative, an ALJ, and a representative of the American Bar Association. A successful candidate is rated and ranked by OPM, consistent with veterans preference requirements, and placed on the register in accordance with his/her score. When an agency seeks to appoint an ALJ, a list of candidates, based upon their ranking and geographical preference, is certified to it by OPM. At the moment, OPM is in the process of developing a new examination scoring formula which will be used to construct a new ALJ register and a pending rulemaking proceeding proposes to modify these qualification and appointment standards in ways that the ALJ community, in comments to OPM, has suggested are inappropriate.² We would be happy to provide the Committee with copies of our comments at its request.

The APA requires agencies to assign cases to each ALJ on a rotational basis "to the maximum extent practical." Hearings are required to be on the record and *ex parte* communications are prohibited. 5 U.S.C. §§ 556, 557. The APA exempts ALJs from the establishment of performance standards for federal agency employees. 5 U.S.C. § 4301(2)(D). OPM regulations expressly prohibit an agency from rating the performance of an administrative law judge. 5 C.F.R. § 930.211, "Performance Rating." Also, OPM regulations bar the granting of performance awards to ALJs. 5 C.F.R. § 930.210(b). These APA protections were designed to ensure that ALJs decide cases independent of agency influence or pressure.

Agency rating or evaluation of the performance of an individual ALJ could constitute a direct or subtle attempt to interfere with his or her decision-making process

² While, in the past, many qualified attorneys, both from the public and private sector, have sought appointment as an ALJ, we submit that the attraction of the position is greatly diminished as ALJ pay fails to keep up with that of senior federal attorneys, without even addressing its failure to maintain its position vis-à-vis the private sector.

and, thus, to affect the outcome of a case. Moreover, while ALJs can be disciplined and removed from office, to ensure ALJ decisional independence, the APA requires that a complaining agency demonstrate good cause for the removal or other discipline of an ALJ in an APA hearing on the record before the Merit System Protections Board. 5 U.S.C. § 7521. OPM regulations mirror these statutory requirements. 5 C.F.R. ¶ 930.210(b).

The unique, independent role of the ALJ in the administrative process is reflected by section 11 of the APA as discussed in the Attorney General's Manual on the Administrative Procedure Act (1947). The Act required and the Attorney General recognized that it is necessary to ensure that Hearing Examiners [now ALJs] possessed superior qualifications." Attorney General's Manual at 121 ("there shall be appointed as many qualified and competent examiners as may be necessary...who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners.")

More than 1300 ALJs serve at thirty different Cabinet-level and independent agencies, from the Department of Agriculture to the United States Postal Service. ALJs adjudicate controversies that involve energy law, including interstate and retail pricing of electricity, oil, and natural gas utilities, antitrust, banking practices, commodity futures, education grants, environmental degradation, food and drug safety, housing violations, immigration law, international trade, labor, mine safety, occupational workplace conditions, postal rates, telecommunications licensing, unfair labor practices, Medicare and social security old age and disability benefits, to name but a few.

Congress further recognized that the duties performed by ALJs are not analogous to the duties performed by other members of the Executive Branch workforce when it created a separate ALJ pay category in 1990. ALJ compensation was modeled on Senior Executive Service (SES) compensation and was then subject to the same Executive Level ceiling for total compensation, exclusive of the bonuses and awards to which the SES were eligible and which the APA prohibited for ALJs. This ALJ compensation system was made more equitable in 1999 by enactment of P.L. 106-97. In that amendment to 5 U.S.C. § 5372, Congress gave the President the discretionary authority to grant ALJs the same basic pay raise authorized for the General Schedule and to adjust ALJ basic pay within a range of a minimum of 65% of EL-IV basic pay and a maximum of 100% of EL-IV basic pay. This authority has been exercised only sparingly.³

³ In 2002, as a first step towards remedying ALJ pay erosion relative to General Schedule pay, the President exercised this authority by granting ALJs a 5.4 percent basic pay increase for ALJs at levels 2 and 3. This included the same national pay raise authorized for the General Schedule and a supplemental adjustment within the EL-IV cap. The President's Pay Agent also extended locality adjustments to ALJs in 2002-2006. These actions were undertaken as part of a graduated effort to close the gap

Integrity of the Administrative Law Judiciary and the Need for OPM to Promptly Reestablish the Longstanding Office of Administrative Law Judges

To ensure the integrity of the federal administrative law judiciary, it is imperative that OPM re-establish an office that exclusively addresses ALJ concerns, is headed by a senior manager with a direct line to the Director, and which meets on a regular and periodic basis with ALJ stakeholders.

An essential element of the Civil Service Commission's reform of its procedures for the recruitment, examination and appointment of hearing examiners (now ALJs), during the 1960s, was the establishment of an Office of Hearing Examiners which reported directly to the Executive Director of the Commission. Subsequently renamed the Office of Administrative Law Judges, the Office was abolished by OPM in 2003 and the performance of its statutory obligation as to ALJs assigned to different sections of the agency. The Office of Administrative Law Judges provided the principle vehicle through which the ALJ community and the bar were able to keep abreast of developments involving ALJ candidates, and to express concerns about the ALJ program administered by OPM under the APA.

In order to perform its statutory responsibilities with regard to ALJs in an exemplary manner, OPM should promptly re-establish the Office of Administrative Law Judges with sufficient stature, leadership and resources to: (1) administer effectively the ALJ application process in a fair, efficient, open and continuous manner; (2) guarantee the expedited scoring of ALJ candidates in the future in support of an open register with the caliber of candidates that are appropriate to the position of ALJ, that is, a job calling for superior, rather than average or ordinary talents; and (3) provide advice within the government and to the interested public as to ALJ matters. The re-establishment of this office would be a significant stride toward restoring cooperative communications between OPM and the bench and the bar, and public confidence in the ALJ selection process.

CONCLUSION

The administrative law judiciary was clothed by the APA with decisional independence and unique statutory protections to ensure that fair and impartial adjudication across the spectrum of national interest. That decisional independence

between ALJ pay levels relative to where they were in 1991, vis-à-vis the General Schedule. A further step was taken in 2004 when the President supplemented ALJ compensation with a modest increase above that authorized for the General Schedule.

cannot and should not be abrogated in the name of pay for performance. The APA prohibits ALJ performance evaluations and precludes performance bonuses and awards to ensure that decisions are made on the record and not exclusive of the record. OPM is responsible for administering the merit-based examination and appointment of ALJs and, in its role as a member of the President's Pay Agent, may recommend that ALJ national compensation be supplemented above that authorized by the Congress for the General Schedule, subject to the statutory cap. Testimony presented today explains why ALJ compensation should be enhanced and made competitive to attract well qualified senior professionals and retain experienced ALJs. It also is imperative that OPM re-establish an office which exclusively addresses ALJ stakeholder issues and consults with the ALJ stakeholder community.